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I. EC Maritime Transport Law and Policy

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CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

I. EC Maritime Transport Law and Policy

II. Competition Law

I. EC MARITIME TRANSPORT LAW AND POLICY

A. Introduction

The EC maritime transport policy was slow to develop. Although the EC Treaty requires the Member States to create a Common Transport Policy,¹ the focus of the Treaty transport provisions² is on inland modes of transport (road, rail and inland waterways).³ However, the EU Council is expressly given competence to decide what 'appropriate provisions' may be adopted for maritime and air transport.⁴

Maritime transport is by its very nature an international mode of transport regulated by a large number of international treaties and conventions, most of them negotiated and concluded within the International Maritime Organization (IMO). Members of the international community, including some EU Member States themselves, were initially reluctant to transfer their sovereignty in this field of transport to the Community. However, two main events gradually changed the attitude of the Member States to the Community's competence to regulate this mode of transport. First, the mid-1980s impetus to establish an internal market by 1992 placed all modes of transport at the centre of the project. It was not feasible to establish a geographical market, stretching from the Atlantic to the Eastern European countries and from the North Sea to the Mediterranean, where goods, people, services and capital would be able to circulate freely,⁵ and in a competitive manner, without the Community seriously addressing transport issues. Thus, unsurprisingly, a number of important legislative proposals affecting the provisions of maritime transport services were adopted and implemented during that period.⁶ The second significant factor in the development of a maritime transport policy was the number of serious marine accidents which took place in the Community's coastal waters during the last 20 years.⁷ These accidents involved oil tankers, which caused vast environmental coastal damage, and passenger ferries, which

¹ Art 3(f) EC Treaty.

² Arts 70–80, Title V EC Treaty.

³ Art 80(1) EC Treaty.

⁴ Art 80(2) EC Treaty.

⁵ These are known as 'the four fundamental freedoms' upon which the European Economic Community was established in the Treaty of Rome, 1957.

⁶ eg Regulation 4055/86, OJ 1986 L378/1, applying the principle of freedom to provide services to sea transport.

⁷ *Herald of Free Enterprise*, 1987; *Exxon Valdez*, 1989; *Scandinavian Star*, 1990; *Agcean Sea*, Dec 1992; *Braer*, Jan 1993; *Estonia*, 1994; *Erika*, Dec 1999; *Express Samina*, Sept 2000; *Prestige*, Nov 2002.

resulted in the loss of life. The resulting public outrage and concern is not to be underestimated in its impact on the Member States' willingness to allow the Community to act on their behalf internationally and to adopt a large number of Community legislative measures, particularly concerning maritime safety and security. Thus, the Community's original limited competence in the field of maritime transport has been developed to a degree that one may indeed ask whether a common transport policy for the provision of maritime transport services is fast becoming a reality.

However, in this paper the focus will be limited to the following recent developments which have taken place in the last few years: the application of the general EU competition law regime to the maritime transport sector; the *ERIKA III* package of safety measures; and the Green Paper on a future EU maritime policy.

B. The EC Competition Regime and the Maritime Transport Sector

The EC competition rules (Articles 81 and 82 EC)⁸ apply to all economic sectors including transport⁹ but until 1986 when Regulation 4056/86 was adopted,¹⁰ there was no comprehensive procedure for their application to the maritime sector. The transport sector was specifically excluded from the scope of the general procedural regulation, Regulation 17/62,¹¹ on the basis that the distinctive features of this industry required different implementation procedures.¹²

Regulation 4056/86 applied only to international maritime services from or to one or more Community ports (Article 1(2)) and was a unique, hybrid, EC competition legislative measure. The Regulation not only provided the means for the application of the EC competition rules to the maritime sector but also contained block exemptions¹³ for certain technical agreements and for liner conference agreements.¹⁴ The exemption for the liner conference agreements was controversial given that agreements, concerning rates (ie price-fixing agreements) and capacity regulation (ie market-sharing agreements), are two types of arrangements which are expressly prohibited in Article 81 EC. Thus Regulation 4056/86 specified detailed provisions as to when the liner conferences themselves could be exempt *en bloc* from the prohibition of Article 81(1) EC. The result was that the EC competition rules were applied to the maritime transport industry in a different manner from that applied to other industries.

Following the extensive modernization of the general EC competition law and

⁸ Art 81 EC prohibits agreements, decisions or concerted practices between undertakings which have the object or effect of preventing, restricting or distorting competition and affecting trade between Member States. Art 82 EC complements Art 81 by prohibiting any abuse by an undertaking of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States.

⁹ Case 156/77 *Commission v Belgium* [1978] ECR 1881.

¹⁰ Regulation 4056/86 laying down detailed rules for the application of Arts [81] and [82] of the Treaty to maritime transport, OJ 1986 L378/4, repealed by Regulation 1419/2006. OJ 2006 L269/1.

¹¹ OJ Sp Ed 1962, No 204/62, p 87. This Regulation has been replaced by Regulation 1/2003.

¹² Regulation 141 JO 1962, 2753.

¹³ Block exemption regulations permit agreements which comply with specified conditions and obligations to be protected from the prohibition of Art 81(1) EC Treaty.

¹⁴ Liner conferences are groups of shipping lines, cooperating on freight rates and making regular price agreements on freight rates in specific trade routes.

enforcement regime,¹⁵ the European Commission initiated a review of Regulation 4056/86, which included extensive consultations with carriers and transport users. At the end of this exercise the Commission concluded that there was no evidence that the conference system of price agreements had led to efficiencies or stability of freight rates or shipping services. Thus, the Commission decided that there was no longer any justification for treating the maritime industry in a different manner from other international industries. The result was the adoption of Regulation 1419/2006¹⁶ repealing Regulation 4056/86 and bringing maritime transport within the general EC competition law enforcement regime, which had been recently modernized and is now governed by Regulation 1/2003.¹⁷ A transitional period of two years will apply to liner conferences which met the conditions of the block exemption regulation on 18 October 2006, the date the new Regulation came into force. Thus the industry has two years to comply with the new circumstances.

A further consequence of this change in the enforcement of the EC competition rules for the maritime industry is that international tramp shipping services and cabotage services (coastal shipping within one Member State) are now subject to the operation of Regulation 1/2003. Tramp shipping services involve the carriage of cargo to a designated destination, normally on a charter basis. These services do not generally operate to a fixed regular schedule and the freight rates are freely negotiated. The provisions of Regulation 4056/86 did not apply to these two types of maritime services so there was no regulation conferring the necessary enforcement powers on the European Commission. Indeed, in the absence of such a regulation, national competition authorities and national courts could have enforced the EC competition rules but these powers were never exercised.

C. Maritime Safety Policy and the ERIKA III Package of Safety Measures

Since 1993, when the Commission issued a Communication entitled 'Common Policy for Safe Seas',¹⁸ the Community has played a significant role in adopting legislation to ensure that ships calling at its ports meet international standards of safety and preserving the marine environment adopted by the IMO. The Community's marine safety policy is now well developed with a large number of legislative measures¹⁹ having been adopted in the last 12 years²⁰ covering matters such as port State control,²¹ classification

¹⁵ See Current Developments (2000) 49 ICLQ 227, 232–4 and (2004) 53 ICLQ 465, 465–6.

¹⁶ OJ 2006 L269/1.

¹⁷ OJ 2003 L1/1, on the implementation of the rules of competition laid down in Arts 81 and 82 of the Treaty.

¹⁸ COM(93) 66 final.

¹⁹ A comprehensive review of the Community's maritime law and policy can be found in chapters 5 and 6 of *EU Maritime Safety Policy and International Law* by Henrik Ringbom due to be published at the end of 2007.

²⁰ For a long time the Member States themselves objected to safety issues becoming part of the Community's maritime transport policy. Safety at sea was traditionally a matter for the Member States to exercise their sovereignty by participating in the international conventions promoted by the IMO. The change in direction was primarily the result of two major oil pollution accidents in European waters: the *Agian Sea* (Dec 1992) and the *Braer* (Jan 1993).

²¹ Directive 98/18 OJ 1998 L144/1 (as amended) and Directive 95/21, OJ 1995 L157/1 (as amended).

societies,²² safety standards for passenger and fishing vessels,²³ management requirements for ro-ro ferries²⁴ and training of seafarers.²⁵ Most of these measures were aimed at safeguarding the interests of coastal and port States and the effect of the legislation was to ensure enforcement of the international and Community rules.²⁶ Nevertheless, following the *Erika* accident off the French Atlantic coast in December 1999, the Community's policy shifted to a more interventionist one with the adoption of the two *Erika* packages of legislative measures which mostly strengthened existing Community legislation.²⁷ However, after the *Prestige* accident at the end of 2002 causing massive oil pollution of the European Atlantic coast, the timetable for setting up the European Maritime Safety Agency was brought forward²⁸ and two further measures were adopted, namely Regulation 1726/2003 amending Regulation 417/2002 on accelerating the phasing-out of single hull oil tankers²⁹ and Directive 2005/35 (the Pollution Sanctions Directive),³⁰ which together with the associated Framework Decision 2005/667/JHA,³¹ sets up a sanction regime for ship-source pollution offences and provides for the imposition of criminal sanctions on persons who violate the international discharge standards. The adoption of these measures has led to concerns that the Community is becoming impatient with the international maritime community and imposing stricter standards on ships visiting its ports than had been agreed internationally.

The Regulation and the Directive are controversial for the following reasons. As far as the phasing-out of the single hull Regulation is concerned, the controversy lay in the fact that agreement at international level on a phasing-out regime had recently been agreed at the IMO and Regulation 417/2002 corresponded to the amended international rules. The Community, by adopting the amending regulation in 2003, and thus accelerating the phasing-out of these oil tankers, basically forced the issue to be reopened

²² Directive 94/57, OJ 1994 L319/20 (as amended)

²³ Directive 97/70, OJ 1997 L34/1 (as amended)

²⁴ Regulation 3051/95, OJ 1995 L320/14 (as amended).

²⁵ Directive 2001/25, OJ 2001 L136/17 (as amended).

²⁶ eg Directive 95/21 OJ 1995 L157/1 (as amended) concerning the enforcement, in respect of shipping using Community ports and sailing in waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions.

²⁷ The *Erika I* package adopted by the Commission in March 2000, just three months after the *Erika* accident resulted in the adoption of the following measures: Directive 2001/106, OJ 2001 L19/17 which strengthens the existing Port State Control Directive; Directive 2001/105, OJ 2001 L19/9, which strengthens the existing Classification Societies Directive; and Regulation 417/2002, OJ 2002 L64/1, which sets up a timetable for phasing out single-hull oil tankers worldwide. The *Erika II* package of measures was aimed at improving maritime safety in EU waters. The following measures were adopted: Regulation 1406/2002, OJ 2002 L208/1, establishing a European Maritime Safety Agency responsible for improving enforcement of the EU rules on maritime safety and Directive 2002/59, OJ 2002 L208/10 establishing a Community vessel traffic monitoring and information system. In addition the Commission had proposed schemes to improve compensation for victims of oil pollution but the Member States preferred to have this matter dealt with at international level and referred the discussion to the IMO.

²⁸ See (n 7).

²⁹ OJ 2003 L249/1; OJ 2002 L64/1.

³⁰ OJ 2005 L191/59. In addition the Community has also adopted Directive 2005/33, OJ 2005 L191/59 regulating the sulphur content in ships' fuels.

³¹ OJ 2005 L255/164 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.

and discussed at the IMO. The Community made it clear it was willing to go ahead with the more stringent regional legislation. In the end the two regimes, the IMO Convention and the Community's legislation, were coordinated but the Community Regulation came into force some 18 months before the international phasing-out scheme was amended. The Pollution Sanctions Directive remains controversial. Criminal penalties may be imposed on any person for violations of the international discharge standards for oil and noxious liquid substances (ie the MARPOL³² discharge standards) where committed 'with intent, recklessly or through serious negligence' in the territorial sea of a Member State. The MARPOL Regulations (I/11(b) and II/5(b)), however, provide an exception for shipowners and masters where they have not caused the discharge intentionally or recklessly with knowledge. Thus, where an unlawful discharge takes place in Community waters, the sanctions will apply to all persons found liable.³³

Finally, in the area of maritime safety policy, the current debate centres on the so-called *Erika III* package of seven legislative measures, presented by the Commission in 2005 and expected to be adopted during 2007. Three of the proposed measures concern important amendments to existing legislation, namely the Port State Directive, Traffic Monitoring and Information System and the Classification Societies Directive,³⁴ and should not have much difficulty in being adopted. The proposed amendments to the legislation in respect of classification societies and port State control will introduce independent quality control systems (with the possibility of financial penalties) for monitoring the work of classification societies and require Member States to inspect 100 per cent of ships entering their ports.³⁵ The amendments to the Traffic Monitoring Directive seek to limit danger to shipping by, for example, requiring fishing ships to have automatic identification systems on board. It also proposes the establishment of a legal framework for places of refuge including designated independent authorities with responsibility for taking decisions as to the most appropriate place of refuge.

The four new proposals concern the establishment of a comprehensive legal framework for flag State requirements and accident investigations³⁶ as well as a new regime for the liability of carriers of passengers by sea (and inland waterways)³⁷ and for civil liability (ie third party liability) and financial guarantees of shipowners whose ships operate in Community waters.³⁸ These are much more controversial proposals. Nevertheless, except for the proposed directive on shipowners' civil liability, the Commission regards these measures as developing existing legislation and implementing existing international rules within the Community.³⁹ Although technically the Commission may be right, these proposals indicate a more proactive Community

³² The 1973 International Convention for the Prevention of Pollution, modified by the 1978 Protocol.

³³ A ruling from the European Court of Justice on the validity of these provisions is pending in Case C-308/06 *Intertanko v Secretary of State for Transport* OJ 2006 C261/9.

³⁴ Directive 95/21 OJ 1995 L157/1 (as subsequently amended); Directive 2002/59 OJ 2002 L208/10; and Directive 94/57 OJ 1994 L319/20 respectively.

³⁵ COM(2005) 587 final and COM(2005) 588 final.

³⁶ COM(2005) 586 final.

³⁷ COM(2005) 592 final.

³⁸ COM(2005) 593 final.

³⁹ COM(2005) 585 final, p 5.

policy in the enforcement of international rules. The measures seek not only to improve accident and pollution prevention but also to deal with the results of accidents at sea. As far as the proposal on flag State requirements is concerned, the objective is to require Member States to ensure, by carrying out rigorous checks, that ships flying their flag comply with international standards.⁴⁰ This will mean that Member States will have an obligation to ensure that a well-equipped maritime administration carries out these functions.

The controversial proposals concern the measures that can be taken to impose liability after an accident has occurred.⁴¹ For example, the proposal seeking to impose liability and damage repair in the event of an accident is centred on the Community's incorporation of the 2002 Athens Convention into EC law.⁴² If adopted, the provisions will apply to all passenger ships operating in the Community, including cabotage and inland waterways. This means that the EU's Member State-registered ships are likely to be under a stricter enforcement regime, ie Community law, than those of the EU's worldwide competitors whose flag States' obligations arise only under international law and without a strict enforcement deterrent. As far as third party liability is concerned, the Community is more likely to pursue this objective at an international rather than a regional level, given that some Member States are unwilling to impose further competitive disadvantages on Community shipowners.

D. The Green Paper on a Future EU Maritime Policy

The Commission's Green Paper on a Maritime Policy was issued in June 2006.⁴³ The Green Paper seeks debate on how to deliver an integrated maritime policy embracing all activities related to the seas, namely, economic,⁴⁴ environmental, scientific and research and governance. Thus the Green Paper is the collective product of seven Commissioners. It highlights the connections that exist between various activities linked to the oceans and seas, and asks whether it is possible to continue to manage and develop overlapping maritime-connected activities without an integrated maritime policy. The Commission hopes to overcome the vested interests by encouraging a year of debate by all stakeholders.

The Green Paper has two main objectives: first, to develop a more integrated approach to maritime policy and, secondly, to gather concrete ideas that will advance existing sectoral maritime policies, such as the protection of the marine environment. The starting premise is the need to maintain Europe's competitiveness in maritime transport given the social and economic importance of the industry. This is indeed one of the aims of EU maritime policy; the other is the protection of the marine environment. Although the opportunity to debate these issues is welcomed, it is unclear what impact, if any, the Green Paper may have on the current work being done to finalize an

⁴⁰ COM(2005) 586 final.

⁴¹ COM(2005) 592 final proposing a regulation on the liability of carriers of passengers by sea and inland waterways in the event of accidents and COM(2005) 593 final proposing a directive on the civil liability and financial guarantees of shipowners.

⁴² COM(2005) 592 final.

⁴³ COM(2006) 275 final entitled 'Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas'.

⁴⁴ This will include shipbuilding, tourism, fisheries, and ports.

EU marine strategy and the associated Marine Strategy Directive.⁴⁵ In the Green Paper, environmental considerations are but one element of the proposed integrated policy rather than the foundation of that policy. The Green Paper, however, appears to confirm that the Community's future direction will be to implement internationally agreed maritime safety rules rather than develop separate regional standards. Such an approach will be welcomed by the international community.

E. Concluding Remarks

In the last six years the Community has been deliberately active, both internally and externally, in promoting the enforcement of internationally agreed standards for the maritime industry. Internally, the Community, acting as a port State, has been active in promoting the adoption of legislative measures covering every aspect of safety at sea. By adopting port State regulation, the Community has been able to bypass jurisdictional limitations and impose international standards on all ships calling on its ports irrespective of whether they are engaged in international transport services or coastal traffic. The recent trend is to ensure robust enforcement of international and EC standards by imposing effective sanctions on non-complying ships, including denial of access to Community ports.⁴⁶ Externally, the Community, either directly or via the Member States, has put significant pressure on the international community to accelerate the implementation of safety measures.⁴⁷ A considerable achievement has been the removal of the special regime set up 20 years ago to apply the EC competition rules to the maritime transport sector. Undertakings offering maritime transport services are now subject to the same enforcement regime as any other undertakings operating in the internal market. Furthermore, liner conference agreements are no longer privileged price-fixing agreements, exempted from the application of Article 81(1) EC Treaty. As for the future, it is unclear whether the Green Paper will bring concrete results and, therefore, be considered a paper tiger, or whether it will indeed be a defining moment in the establishment of a common EU maritime transport policy. Only time will tell.

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⁴⁵ COM(2005) 505 final establishing a Framework for Community Action in the field of Marine Environmental Policy. The proposal seeks to establish European marine regions on the basis of geographical and environmental criteria.

⁴⁶ There is also evidence that the Community is willing to impose stricter standards than those agreed internationally. For example, Directive 2005/33 (OJ 2005 L191/59) regulating the sulphur content of ships' fuel provides also for fuel requirements in respect of passenger ships in regular traffic between Community ports which is not an international standard requirement.

⁴⁷ The most striking example was the phasing-out of single hull oil tankers.

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